Supreme Court, U.S.
FILED

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No. 08-

IN THE

Supreme Court of the United States

DENNIS J. LAROCHE

Petitioner,

v.

ERIC KEN SHINSEKI,
Secretary of Veterans Affairs,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United State Court of Appeals for the Federal Circuit, affirmed, the United States Court of Veterans Claims dismissal, as untimely, of Petitioner LaRoche's Notice of Appeal despite the fact that the Notice of Appeal was postmarked on a United States Postal Service electronic Postal Meter, and mailed by means of the United States Postal Service, on Wednesday, November 7, 2007. The Board of Veterans Appeals (BVA) decision being appealed was issued on July 11, 2007. As a result, the 120 day window for taking an Appeal to the United States Court of Veterans Claims, closed on Thursday, November 8, 2007, the day after Petitioner LaRoche's notice of appeal was postmarked and mailed. Petitioner LaRoche's Notice of Appeal was not received in Washington D.C., and docketed by the clerk of the court until Tuesday, November 13, 2007, 3 business days after it was mailed from Gainesville, Florida (Monday, November 12, 2007 was a federal holiday). Petitioner LaRoche's Notice of Appeal should have been deemed to be timely filed pursuant to 38 U.S.C §7266, as amended. Congress amended 38 U.S.C §7266 in response to the Federal Circuit's Decision in *Espelita v. Denwinski*; 958 F.2d1052 (Federal Circuit 1992), to specifically provide for deemed filing, using the postmark date for the date of filing. As amended, the statute provides in pertinent part "A notice of appeal shall be deemed to be received by the Court as on the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed. The record below shows that the envelope (cover) in which Petitioner Laroche's Notice of Appeal

was mailed to the Court of Veterans Claims, by means of the United States Postal Service, bears the licensed United States Postal Service electronic, unalterable postmark date and place of November 7, 2007, Gainesville Florida. Petitioner LaRoche's appeal was improperly dismissed pursuant to Rule 4(a)(1) of the Court of Veterans Claims which allows an appeal to be deemed to be filed only "on the date of its legible postmark, affixed by the United States Postal Service (not including a postage meter-metered date imprint other than one affixed by the United States Postal Service) on the cover in which the Notice of Appeal is posted, if the mailing is properly addressed to the Court and is mailed".

Five questions are presented:

1. Whether the Postmark on the envelope (cover) containing Petitioner LaRoche's Notice of Appeal is an United States Postal Service postmark as intended by Congress when it amended 38 U.S.C. §7266.

2. Whether Rule 4(a)(1) of the Court of Veterans Claims is in derogation of 38 U.S.C §7266 which, on its face, contemplates the use of metered mail postmarks; as only metered mail can have the date of the United States Postal Service postmark stamped on the cover in which the notice is posted prior to being mailed.

3. Whether Rule 4(a)(1) of the Court of Veterans Claims has not had a rational basis since March 31, 1999, the date the rules of the United States Postal Service made it illegal to possess and use a mechanical postage meter capable of "backdating" the postmark date.

4. Whether Rule 4(a)(1) of the Court of Veterans Claims assumes that officers of the United States Postal Service will not do their duty and, in the usual course of business, detect and re-postmark mail which was postmarked, but not mailed, on the postmarked date

5. Whether the appeal should have been deemed to have been received by the Court of Veterans Claims on Wednesday, November 7, 2007, the date of the unalterable, electronic postage meter, United States Postal Service postmark date.

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OPINION BELOW

The United States Court of Appeals for the Federal Circuit affirmed the decision of the United States Court of Appeals for Veterans Claims dismissing Petitioner LaRoche's Notice of Appeal; without opinion. The opinion of the United States Court of Appeals for Veterans Claims is Appendix B.

STATEMENT OF JURISDICTION

The Federal Circuit's opinion was rendered February 10, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 38 U.S.C. §7266

> (a) In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104 (e) of this title.
>
> (b) An appellant shall file a notice of appeal under this section by delivering or mailing the notice to the Court.

(c) A notice of appeal shall be deemed to be received by the Court as follows:

(1) On the date of receipt by the Court, if the notice is delivered.

(2) On the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed.

(d) For a notice of appeal mailed to the Court to be deemed to be received under subsection (c)(2) on a particular date, the United States Postal Service postmark on the cover in which the notice is posted must be legible. The Court shall determine the legibility of any such postmark and the Court's determination as to legibility shall be final and not subject to review by any other Court.

Rule 4 of the United States Court of Appeals for Veterans Claims: Filing Appeal; Docketing; Board Decision

(a) Time for Appeal. A Notice of Appeal must be received by the Clerk not later than 120 days after the date on which the Board mailed notice of the decision to the last known address of the appellant and the appellant's authorized representative, if any. A Notice of Appeal is deemed to be received—

(1) on the date of its legible postmark, affixed by the United States Postal Service (not including a postage meter-metered date imprint other than one affixed by the United States Postal Service) on the cover in which the Notice of Appeal is posted, if the mailing is properly addressed to the Court and is mailed; or

(2) on the date of its receipt by the Clerk, if it does not bear a legible postmark affixed by the United States Postal Service, or if it is delivered or sent by means other than United States mail, including fax.

But see Rule 25 (b)(3) as to an appellant confined in an institution.

(b) Docketing.

(1) Docketing the appeal. Upon receipt of the Notice of Appeal, the Clerk will docket the appeal, identifying the appellant by name, unless otherwise ordered by the Court.

(2) Designation of public official. The Secretary will be described as the appellee by name and official title.

> (3) Notice of Docketing. The Clerk will send a Notice of Docketing to all parties advising them of the date when the Clerk received the Notice of Appeal.

(c) Copy of Board Decision. Not later than 30 days after the date of the Clerk's Notice of Docketing (see subsection (b)(3)), the Secretary must file with the Clerk and serve on the appellant a copy of the Board's decision, showing—

> (1) the date on which notice of the decision was mailed, and
>
> (2) the filing date of any motion for its reconsideration or vacatur and the date and nature of any action on such a motion.

STATEMENT OF THE CASE

Petitioner LaRoche is an American veteran seeking benefits from the Department of Veterans Affairs (VA) . Petitioner's Board of Veterans Appeals (BVA) decision was issued on July 11, 2007. A BVA decision is the final administrative decision of the VA. Pursuant to 38U.S.C. §7266 Petitioner had 120 days to file an appeal with the Court of Veterans Claims. That 120 day window for taking an Appeal to the Court of Veterans Claims, closed on Thursday, November 8, 2007. On Wednesday, November 7, 2007, a legal assistant, on behalf of Petitioner completed both Notice of Appeal (Court of Veterans Claims Form 1) and a Notice of Appearance (Court of Veterans Claims

Form 3)for filing with the Clerk of the Court of Veterans Claims on behalf of Petitioner LaRoche. (A.5-7) The Notice of Appeal was then signed and dated Wednesday, November 7, 2007, as was the required Notice of Appearance, which was signed under penalty of perjury. Although the forms could have been FedExed for next day delivery, or simply sent by facsimile to the clerk of the court on either Wednesday the 7th or Thursday the 8th, the legal assistant elected to mail the appeal documents to the court and rely on the postmark deeming rule.

Thereafter, the legal assistant took the envelope containing the originals of the Notice of Appeal and Notice of Appearance and ran it through a licensed electronic United States Postal Service postage meter. The electronic postage meter weighed, endorsed postage and officially postmarked the envelope with the November 7, 2007 date and the Gainesville, Florida place of mailing. (A. _) The legal assistant then took envelope containing the Notice of Appeal and Notice of Appearance and mailed them at the United States Postal Service's main Post Office in Gainesville, Florida. The envelope was then optically scanned and electronically processed. Because the envelope's postmarked date was also the mailing date of the envelope, the Postal Service's computerized mail processing equipment did not re-postmark the envelope. (Had the envelope been mailed on Thursday November 8, 2007, the Postal Services' automated mail processing equipment would have re-postmarked the envelope "November 8, 2007 Gainesville, Florida" 3 Business days later, the notice of appeal and Notice of Appearance forms were received 800 miles away, in Washington D.C., by the Clerk of the Court for the Court of Appeals for Veterans Claims. Although the envelope was postmarked November

7, 2007, properly addressed to the court, and mailed; the Court of Appeals for Veterans Claims dismissed the appeal. The dismissal, pursuant to Rule 4(a)(1), of the Court of Appeals for Veterans Claims, was entered because the does not accept electronic postage meter postmarks as United States Postal Service postmarks. Therefore, receipt by the court of the Notice of Appeal on Tuesday November13, 2007, the 125th day was untimely.

Petitioner Appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the dismissal without an opinion on February 10, 2009.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because The Decision Of The Federal Circuit Decides An Important Federal Question That So Departs From The Accepted And Usual Course Of Judicial Proceedings That The Supervising Power Of The Supreme Court Must Be Exercised.

(A) Review is warranted because the Postmark on the envelope (cover) containing Petitioner LaRoche's Notice of Appeal is an United States Postal Service postmark as intended by Congress when it amended 38 U.S.C. §7266.

This proposition is evidenced by the Code of Federal Regulations; TITLE 39—POSTAL SERVICE, CHAPTER I—UNITED STATES POSTAL SERVICE, PART 501_AUTHORIZATION TO MANUFACTURE AND DISTRIBUTE POSTAGE EVIDENCING

SYSTEMS. Legal title to all postage meters is held by the United States Postal Service which is why they require the following language to be imprinted on all postage meters "RENTED POSTAGE METER-NOT FOR SALE". 39 CFR §501.17. Furthermore, Postage Meter manufactures are regarded as "Postage Meter Leasing Agents" by the United States Postal Service , who's regulations include "Meters may be leased from authorized manufacturers who are held responsible by the United States Postal Service for meter control, operation, replacement, and maintenance."

(B) Review is warranted because Rule 4(a)(1) of the Court for Veterans Claims is in derogation of 38 U.S.C §7266 which, on its face, contemplates the use of metered mail postmarks; as only metered mail can have the date of the United States Postal Service postmark stamped on the cover in which the notice is posted prior to being mailed.

38 U.S.C. §7266(c)(2) provides: [O]n the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court **and is mailed**. (emphasis added) 1.The United States Postal Service postmark must be stamped on the cover; 2. The envelope (cover) must be properly addressed to the Court; and 3. The envelope (cover) must also actually be mailed. Only mail that is postmarked by a United States Postal Service postage meter can have a postmark stamped on the cover and then be mailed. Envelopes (covers), properly addressed to the Court, which are do not have metered postmarks are first given to the United States

Postal Service for mailing, only then are they postmarked. So, Congress obviously meant to include metered mail by it's specific language.

(C) Review is warranted because Rule 4(a)(1) for the Court for Veterans Claims has not had a rational basis since March 31, 1999, the date the rules of the United States Postal Service made it illegal to possess and use a mechanical postage meter capable of "backdating" the postmark date.

This Court has been dealing with postage meter cases since *James v. Campbell*, 104 U.S. 356 in 1882. Rule 4(a)(1) of the Court for Veterans Claims might have made sense when Pitney and Bowes first went into business in 1921, licensing mechanical postage meters. After all the user set the postmark date by hand on a mechanical meter. However, after March 31, 1999 all postage meters in the United States have been electronic, with an internal electronic clock that sets the postmark date. i.e., such meters have been decertified by the United States Postal Service pursuant to 39 CFR § 501.17 A user can no more "backdate" a postmark on an electronic postage meter than they can change the date and time settings on their cellphone. *See also* http://support.pb.com/ekip/index?page=home&type=ref&id=80212019189a7730105342be210005df2&cat=MAILSTATION_DIGITAL_POSTAGE_METER "Advance the Date

This can be used when preparing outgoing mail for a future business day's mailing.

NOTE:

* Changing the printed date does not change the postage meter's internally held date

* The printed date can be returned to the current date

* **The printed date cannot be dated earlier than the meter's internally held date (in an effort to "backdate" the mail)**" (Emphasis added)

(D) Review is warranted because Rule 4(a)(1) of the Court for Veterans Claims assumes that officers of the United States Postal Service will not do their duty and, in the usual course of business, detect and re-postmark mail which was postmarked, but not mailed, on the postmarked date

This Court has long recognized "the probability that the officers of the government will do their duty and the usual course of business." *Rosenthal v. Walker*, 111 U.S. 185, 193, 4 S.Ct. 382, 28 L.Ed. 395 (1884). Yet, in this matter Rule 4(a)(1) of the Court for Veterans Claims assumes that officers of the United States Postal Service will not do their duty and, in the usual course of business, detect and re-postmark mail which was postmarked, but not mailed, on the postmarked date. There is no basis for the Veterans Court to assume or codify it's assumption that the United States Postal Service can't be relied on by the court.

(E) Review is warranted because the appeal should have been deemed to have been received by the Court of Veterans Claims on Wednesday, November 7, 2007, the date of the unalterable, electronic postage meter, United States Postal Service postmark date.

There is no evidence of record to refute, and the Secretary of Veterans Affairs has never alleged, that the envelope covering the Notice of appeals was not mailed on Wednesday November 7, 2007. See, *Fallen v. United States* 378 U.S. 139 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964)

CONCLUSION

For all of the forgoing reasons, Petitioner respectfully requests that the Supreme Court grant review in this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND FILED FEBRUARY 10, 2009

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-7110

DENNIS J. LAROCHE,

Claimant-Appellant,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,

Respondent-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Appeals for Veterans Claims

In CASE NO(S). 07-3392

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (LINN and PROST, *Circuit Judges* and ARTERTON, *District Judge**).

* Honorable Janet B. Arterton, United States District Court for the District of Connecticut, sitting by designation.

Appendix A

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT
s/ Jan Horbaly
Jan Horbaly, Clerk

DATED FEB 10 2009

APPENDIX B — MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DATED FEBRUARY 27, 2008

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 07-3392

DENNIS J. LAROCHE,

Appellant,

v.

JAMES B. PEAKE, M.D.,
Secretary of Veterans Affairs,

Appellee.

MEMORANDUM DECISION

HOLDAWAY, *Judge*: On November 13, 2007, the appellant filed a Notice of Appeal (NOA) from a July 11, 2007, Board of Veterans' Appeals (Board or BVA) decision. The appellant's NOA was received by the Court 125 days after the BVA mailed its decision. On December 4, 2007, the Court ordered the appellant to show cause, within 20 days after the date of the Court's order, why this appeal should not be dismissed.

On January 17, 2008, the appellant, through counsel, filed a response to the Court's show cause order. The appellant states that his NOA was mailed through the U.S. Postal Service (USPS) on November 7, 2007, even

though it was not docketed by the Court until November 13, 2007, (Monday, November 12, 2007, was a Federal holiday). Accompanying the appellant's response is an affidavit signed by the appellant's counsel's legal assistant indicating that on November 7, 2007, she stamped the envelope containing the NOA with the office postage meter and deposited the envelope at the USPS main branch in Gainesville, Florida. The Court notes that there is no USPS postmark affixed to the envelope containing the appellant's NOA.

Under 38 U.S.C. § 7252, the Court has exclusive jurisdiction to review decisions of the Board. To obtain this review, a person adversely affected by a Board decision shall file an NOA with the Court within 120 days after the date the Board decision is mailed. *See* 38 U.S.C. § 7266; U.S. Vet.App. R. 4. The appellant has not demonstrated that his NOA is timely.

Accordingly, this appeal is DISMISSED.

DATED: FEB 27 2008

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DATED MARCH 21, 2008

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 07-3392

DENNIS J. LAROCHE,

Appellant,

v.

JAMES B. PEAKE, M.D.,
Secretary of Veterans Affairs,

Appellee.

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

Under Rule 36, judgment is entered this date.

DATED: MAR 21 2008

FOR THE COURT:

NORMAN Y. HERRING
Clerk of the Court

By: s/ Willette Cash
Deputy Clerk

APPENDIX D — POSTAGE METERED ENVELOPE DATED NOVEMBER 7, 2008

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